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No. 734

In the Supreme Court of the United States

OCTOBER TERM, 1968

STATE OF ALASKA, ET AL., APPELLANTS

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO, ET AL., AND NATIONAL LABOR RELATIONS BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the National Labor Relations Board moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App.)[1] which: (1)

[1] The proceedings before the three-judge district court involved two cases—J–18–67 and J–19–67—which were consolidated for purposes of hearing and decision, but the court entered separate judgments in each case. See pp. 7–8, *infra*. It is not clear whether the appellants are appealing from the judgments in both cases or only from that in J–18–67. The judg-

declared certain Alaska statutes unconstitutional under the supremacy clause of the Constitution because they invade an area pre-empted by the National Labor Relations Act; (2) enjoined the enforcement of those statutes; and (3) enjoined the enforcement of an injunction issued by the Superior Court of Alaska (J.S. App. 41–42) because it similarly intruded into an area pre-empted by the National Labor Relations Act.

A. THE BACKGROUND FACTS

Local 302 of the International Union of Operating Engineers AFL-CIO has its principal office in Seattle, Washington, but maintains other offices in Anchorage, Juneau, and Fairbanks, Alaska (F. 4).[2] At each of these Alaskan offices the Union operates a hiring hall pursuant to collective bargaining agreements it has with Alaskan employers (see F. Exh. C). One of these agreements (F. Exh. C) is with the Alaska Chapter of the Associated General Contractors of America ("AGC"), whose employees are represented by the Union pursuant to a certification issued by the National Labor Relations Board (F. 3).

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ment reproduced at J.S. App. 1–3 contains the caption of J–19–67, but the provisions of the judgment entered in J–18–67 (but cf. J.S. 21). Since the Board is a party only in J–18–67, this motion to affirm is confined to the judgment in that case.

[2] "F." refers to the stipulation of facts signed by all parties in J–18–67, and "Exh.", to the accompanying exhibits (all exhibits except "O" referred to in the stipulation of facts were introduced by the plaintiffs; exhibit "O" was put in by the State of Alaska). F–2 refers to the stipulation of facts signed by all parties in J–19–67. References to affidavits filed by the parties include the docket number.

The Union is also the certified representative of employees of more than 50 other employers who are parties to similar agreements (F. 3).

For the last several years there has been a dispute between the Union and certain of its members in the Anchorage area concerning the chartering by the International of a separate local in Alaska (see Affidavit of Russell T. Conlon, Doc. No. 7, pp. 7–8). Some of these Alaska members of the Union have complained to the Governor and the Legislature that the Union has discriminated against Alaska residents in hiring and job dispatching (F. 4). Several of the complainants contended that the Union particularly discriminated against them, with respect to job opportunities, because of their vocal position in favor of "local autonomy" (J.S. App. 33–36).

Five Union members filed unfair labor practice charges with the Board asserting that this alleged discrimination violated Section 8(b) of the National Labor Relations Act (F. Exh. M, and see Affidavit of Russell T. Conlon, *supra*, pp. 7–8). Based on one of these charges, filed by Martin B. Fanelli on October 17, 1966, the General Counsel of the Board issued an unfair labor practice complaint against the Union (F. Exh. M, p. 4). After a hearing, a Trial Examiner of the Board found that there had been no discrimination and recommended that the complaint be dismissed (F. 1; Exh. M, p. 11). No exceptions to the Trial Examiner's decision were filed with the Board. Other unfair labor practice charges filed by members proposing "local autonomy" were withdrawn (J.S. App.

36, and see Affidavits of Russell T. Conlon, *supra*, pp. 7–8).

In the Spring of 1967, the Legislature of the State of Alaska passed a statute ("the Local Autonomy Act") requiring international or national unions with more than 100 Alaskan resident members to charter an Alaskan local (J.S. App. 43).[3] The International Union of Operating Engineers refused to comply with this statute (F. 5). On September 20, 1967, the Governor issued Administrative Order No. 5 which directed that all future contracts with the State include a provision whereby the contractor would agree not to enter a contract with, nor accept a dispatch from, a union not in compliance with "the state local autonomy law and all state regulations made pursuant thereto" (F. 2, Exh. D). On October 18, 1967, the AGC notified the Union that all future contracts with the State would include the contractual provisions required by Administrative Order No. 5, "whether or not these provisions are consistent with the hiring provisions of existing labor contract [between the Union and AGC]" (F. 2, Exh. E).

Meanwhile, on October 12, 1967, Alaska instituted criminal proceedings under the Local Autonomy Act against the International, its Local 302, and individual agents of Local 302 (F. 5; Exhs. E and F). On the same day, the State brought a civil action in the State Court for an injunction restraining the International, Local 302, and certain of its agents from "engaging in any other business, activities or functions of a labor organization within the State of

[3] The Act became effective on May 23, 1967.

Alaska" until they comply with the Local Autonomy Act (F. Exh. 41, p. 7).[4] The State also sought an order directing the defendants to charter "a *bona fide* autonomous Local union" and promptly "to hold such elections of officers, establish by-laws and turn over funds, records, facilities and premises * * * as may be necessary to enable such local organization to function properly" (*ibid.*).

On January 11, 1968, the State sought a preliminary injunction in the civil action (J.S. App. 22). On March 8, 1968, the State court, finding that the Union and the other defendants had "systematically discriminated against Alaskan residents who are qualified members of Local 302, and have favored non-resident members of said Local in referring members to jobs" (J.S. App. 38),[5] entered a preliminary injunction restraining the defendants from operating a hiring hall within the State of Alaska "which unfairly discriminates against any member of defendant Local 302 or violates his right to seniority preference in employment under existing labor-management contracts, or grants a preference, not based on seniority rights to non-Alaska resident members of defendant Local 302" (J.S. App. 41).

[4] The State subsequently amended its complaint to delete this matter.

[5] The State court rejected the defendants' contention that the subject matter was within the exclusive jurisdiction of the National Labor Relations Board, on the ground that the relief sought was "in the nature of requiring that defendants provide the citizens of Alaska who are members of defendant Local 302 with the fair representation to which they, and the State and its citizens derivatively, are entitled" (J.S. App. 39–40).

Finally, in May of 1968, the Alaska legislature passed amendments to the Local Autonomy Act which, *inter alia,* required a union operating a hiring hall in Alaska without a local charter to keep dispatching records in accordance with regulations published by the Commissioner of Labor[6] (enforceable by criminal penalties including imprisonment); and permitted the Commissioner of Labor to provide exemptions from the Act for unions which maintain local-hire preference provisions in all of its contracts in Alaska. (J.S. App. 44–46.)

B. THE PROCEEDINGS BELOW

On October 25, 1967, the Union and several of its members filed a complaint in the federal district court for the District of Alaska (J–18–67), under 28 U.S.C. 1331 and 1337, seeking an injunction restraining State officials from enforcing the Local Autonomy Act, and a declaration that the Act was unconstitutional on several grounds, including preemption by the National Labor Relations Act. A subsequent amendment to the complaint sought similar relief with respect to the 1968 amendments to that Act, as well as an injunction against any further proceedings to enforce the Alaska State court's preliminary injunction. Pursuant to the plaintiffs' request, a three-judge district court was convened. The National Labor Relations Board intervened in the proceeding.

At the time it filed that suit (J–18–67), the Union also filed an action in the district court against AGC, pursuant to Section 301 of the Labor Management Re-

[6] The Regulations were issued on May 31, 1968 (F. 3; Exh. 2).

lations Act (J–19–67) (see n. 1, *supra*). The Union alleged that AGC's notification of intent to abide by the Governor's Administrative Order No. 5 constituted a notice of intention to breach its collective bargaining agreement and sought a declaratory judgment as to the validity of the bargaining agreement. The State of Alaska intervened in this action as a party defendant, and the Union filed a claim for relief against the State similar to that sought in J–18–67, and also moved for a three-judge court.[7]

On the basis of a stipulation of facts by the parties, the district court held that the Local Autonomy Act and its amendments invaded an area preempted by the National Labor Relations Act, and thus were invalid (J.S. 12–13). The court further held that the State court injunction was likewise invalid for the discrimination at which it was directed—"job referral discrimination to strengthen union authority—clearly is within the exclusive jurisdiction of the National Labor Relations Board" (J.S. App. 15). Accordingly, in J–18–67, the court entered an order enjoining the enforcement of the State statute and the State in-

[7] On May 3, 1968, three members of the Union, Leo A. Phillips, Alfred M. White, and William Jones, represented by separate counsel (see Docket entry 46), moved to intervene on the side of the State. Plaintiffs and the Board opposed the motion because of the likely delay, and it was denied on May 22, 1968. No appeal from the denial of the motion was taken by Phillips, White, and Jones, until counsel for the State filed an amended notice of appeal on August 26, 1968, which sought to include them as well as the State and its officials. In these circumstances, it would appear that an appeal by these individuals, which could only contest the propriety of the denial of intervention, was not timely filed under 28 U.S.C. 2101(b).

junction (J.S. App. 2–3), and, in J–19–67, it entered a judgment confirming the validity of the collective agreement between the Union and the AGC.

ARGUMENT

1. Appellants' basic challenge to the ruling of the district court is that the amended Local Autonomy Act and the State court proceedings to enforce the Act do not invade an area pre-empted by the National Labor Relations Act.[8] In *Hill* v. *Florida*, 325 U.S. 538, this Court struck down a Florida statute which required a union business agent to obtain a State license, and to file certain information with the State because the licensing requirement circumscribed "the 'full freedom' of choice which Congress said employees should possess" in the selection "of a collective bargaining representative" (325 U.S. at 541), and "interfere[d] with the collective bargaining process" (*id.* at 542). In addition, the Court found that the sanc-

[8] Appellants suggest that the convening of a three-judge court was error (J.S. 21), but do not present any support for this contention. Since the district court found that plaintiffs' direct constitutional challenges to the State statute (other than on pre-emption grounds) were substantial (J.S. 13), a three-judge court was properly convened under 28 U.S.C. 2281. *Locomotive Engineers* v. *Chicago R.I. & P.R. Company*, 382 U.S. 423, 428.

Appellants also contend (J.S. 12) that the district court improperly refused to take testimony on the nature of the Union's alleged discriminatory practices. However, the State of Alaska agreed to a stipulation of facts in both J–18–67 and J–19–67, and did not seek to present additional testimony (*supra*, p. 7). Moreover, a number of the assertions concerning discrimination by the Union and its general effect on the State, contained in appellants' Statement of the Case without supporting citation (J.S. 6–8), are not reflected in either the stipulations or the affidavits incorporated therein.

tion imposed for failure to comply with the statute—*i.e.*, an injunction barring the union from operating within the State, with the possibility of criminal punishment for contempt—also interfered with "the federally protected process of collective bargaining" (*id.* at 543).

The Alaska statute and the regulations relating thereto likewise impermissibly interfere "with the full freedom of workers to choose a bargaining agent and in the collective bargaining process" (J.S. App. 12–13). The Local Autonomy Act requires an international or national union—once it gains more than 100 members residing in Alaska—to charter an Alaska local (AS. 23.40.050; J.S. App. 43). Without an exemption,[9] such a union that continues to operate within the State of Alaska without chartering an Alaska local, is subject to criminal penalties and civil sanctions, including an injunction (AS. 23.40.054, 23.40.060; J.S. App. 45, 46).[10]

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[9] The Commissioner of Labor is authorized to grant an exemption from the requirement to establish an Alaska local where the labor organization:

* * * * *

(2) maintains local-hire preference provisions in all its labor-management agreements in the state; or

(3) maintains provisions in its constitution and bylaws for the election, by and from among the members of the organization who reside in Alaska, of a business agent or other person in charge of hiring hall in Alaska, and of dispatch and grievance procedures. [AS. 23.40.056; J.S. App. 45.]

[10] Moreover, the union's officers are subject to criminal penalties if they attempt to discourage the formation of an Alaska local, or fail to maintain the required records (AS. 23.40.052, 23.40.060; J.S. App. 44–45, 46).

To require an international or national union to charter an Alaska local affects its ability to represent employees, and abridges the employees' freedom of choice, no less than the licensing requirement in *Hill*. An interstate local, such as Local 302, may be able to provide better representation than an Alaska local because of its greater power vis-a-vis the employers. In any event, Section 7 of the National Labor Relations Act permits the employees to select an interstate union as their representative if they wish.

Moreover, since an interstate union which does not charter an Alaska local and does not maintain the records required by the Alaska statute is subject to criminal penalties and injunction, the union cannot continue to operate in the State unless it complies with the statute.[11] Thus, here, as in *Hill*, the sanction imposed "brings about a situation inconsistent with the federally protected process of collective bargaining" (325 U.S. at 543). And, here, as in *Hill*, the State requirement has "already interfered with the collective bargaining process" (*id.* at 542), because the AGC has refused to honor its contract with Local 302 insofar as it does not comply with the Governor's Administrative Order No. 5, issued to implement the statute (*supra*, p. 4).[12]

[11] As noted (*supra*, pp. 4–5), in the civil suit in the Alaska State court, the State originally sought an injunction restraining the Union from functioning in Alaska. It later amended its complaint to seek only a mandatory injunction requiring compliance with the Local Autonomy Act.

[12] The conflict with the National Labor Relations Act is not alleviated by the exemptions, which provide that an interstate union need not charter an Alaska local if its collective bargaining agreements contain a hiring preference for Alaska residents,

Appellants contend (J.S. 12, n. 6) that the Local Autonomy Act does not interfere with employee freedom of choice because it merely requires that an Alaska local be chartered *in addition* to whatever other representative may be selected. This contention misses the point, for the National Labor Relations Act gives the employees in the bargaining unit the right to decide that they want an interstate local affiliated with an international which does not have an Alaska local as their representative.[13] Appellants also contend (J.S. 13–14) that, absent the Local Autonomy Act, Alaska workers must choose between representation by existing unions operating in the State and the

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or if it places an Alaska resident in charge of the hiring hall in Alaska and of dispatch and grievance procedures (n. 9, *supra*). Since, under federal law, the terms under which employees will be referred for hire, and those under which the hiring hall and the grievance procedure will be operated are matters for collective bargaining between the parties, a State interferes with the process of collective bargaining by mandating contract terms and other conditions which would either require or most likely result in discrimination against non-residents. Cf. *Teamsters Union* v. *Oliver*, 358 U.S. 283, 297.

Finally, the provision of the Alaska statute barring union officials from discouraging the formation of an Alaska Local (AS. 23.40.052; J.S. App. 44–45) regulates conduct which is an unfair labor practice under the National Labor Relations Act (see *infra*, p. 13), and the record requirements (AS. 23.40.045; J.S. App. 44) regulate conduct protected by Section 7 of that Act (see *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667). State regulation of such conduct is barred under *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245.

[13] The contention is also inconsistent with the State's prayer for relief in the State court suit. Paragraph XVII(1) seeks an order requiring Local 302 to turn over unspecified funds, records, facilities, and premises to a newly chartered "bona fide" local (*supra*, p. 5); this suggests the complete substitution of another local for Local 302.

rejection of "union representation altogether." But Alaskan dissidents of Local 302 or any other labor organization are free to form their own union and to petition, at an appropriate time, for elections in the various Alaskan bargaining units.[14]

2. Appellants further contend (J.S. 16–20) that the Local Autonomy Act, and especially the preliminary injunction issued by the State court, were directed only at the Union's breach of its duty of fair representation, and thus were sanctioned under *Vaca* v. *Sipes*, 386 U.S. 171. However, assuming that a State would have power to enact legislation directed at breaches of the duty of fair representation, the statute would have to be narrowly drawn so as to reach only the kind of conduct which Federal law regards as unfair representation, and its remedies would have to be a reasonable means of alleviating that particular problem. There is no indication that the State, when it enacted the Local Autonomy Act, was concerned, even in part, with implementing the federal duty of fair representation. Moreover, the remedies imposed by the statute (*e.g.*, the requirement of chartering an Alaska local) go beyond what is necessary to cure a breach of the duty of fair representation, and infringe upon rights protected by Federal law.

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[14] *De Veau* v. *Braisted*, 363 U.S. 144 (J.S. 19), is clearly distinguishable, as the court below found (J.S. App. 11–12). There, unlike here and in *Hill*, "the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations," and it had approved "the heart of the state legislative program explicitly brought to its attention." 363 U.S. at 155.

The State court preliminary injunction stands on no firmer ground. The injunction was issued in a suit which the State brought to enforce the Local Autonomy Act. It is, therefore, doubtful whether it can be disassociated from that statute, notwithstanding the State court's attempt to predicate the injunction on breach of the duty of fair representation (J.S. App. 39–40), and its action in merely enjoining, *inter alia*, unfair discrimination (J.S. App. 41). But even if the injunction could be separated from the statute, it is still invalid because the affidavits relied on by the State court alleged that the Union had refused to refer union members to jobs because they had opposed the Union leadership on the local autonomy issue (J.S. App. 33–37). For a union to deny job opportunities to an employee-member as a reprisal for his failure to abide by, or his opposition to, union rules or policies, violates Section 8(b) (2) and (1) (A) of the National Labor Relations Act, wholly apart from any breach of the duty of fair representation.[15] Thus, State regulation of this kind of activity is barred

[15] See *National Labor Relations Board* v. *A & B Zinman, Inc.*, 372 F. 2d 444, 445 (C.A. 2), and cases there cited; *National Labor Relations Board* v. *Local 542, International Union of Operating Engineers*, 329 F. 2d 512, 514 (C.A. 3); *Lummus Company* v. *National Labor Relations Board*, 339 F. 2d 728, 731–735 (C.A.D.C.). See also *Plumbers' Union* v. *Borden*, 373 U.S. 690, 696, n. 7.

Indeed, the State court recognized that the employees had filed charges with the Board (J.S. App. 37). See *supra*, p. 3. The Board's jurisdiction is not diminished because it found that one of the charges lacked evidentiary support, and the others were withdrawn.

under the general pre-emption principle of *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236. See *Plumbers' Union* v. *Borden*, 373 U.S. 690; *Iron Workers* v. *Perko*, 373 U.S. 701.[16]

CONCLUSION

The judgment of the district court in J–18–67 should be affirmed.

Respectfully submitted.

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[16] By specifically prohibiting the Union from granting a referral preference to non-Alaska resident members of the Union not based on seniority (J.S. App. 41), the Superior Court's order also runs afoul of *Teamsters Union* v. *Oliver*, *supra*. For the contract between the Union and the AGC requires the Union to grant dispatching preferences not based on seniority when an employer requests a "particular man" recently laid off or operating engineers with "special skills" (F. Exh. C, pp. 6–7).

Although appellants do not raise the issue, 28 U.S.C. 2283 was not a bar in this case, for the reason, *inter alia*, that the injunction against the State court decree was sought by the Board, an agency of the United States. See *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; cf. *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U.S. 501.

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